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August 9, 2005

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: San Pedro Railroad Operating Company, LLC
Abandonment Exemption in Cochise County, AZ
STB Docket No. AB-441 (SUB-NO 4X)

Dear Mr. Williams:

Enclosed for filing in the above referenced docket is "Chemical Lime Company's Motion to Strike Portion of Reply." Please contact me with any questions regarding this filing.

Sincerely,



Rusty A. Brewer

Enclosure

BEFORE THE SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-441 (SUB-NO. 4X)

**SAN PEDRO RAILROAD OPERATING COMPANY, LLC
-- ABANDONMENT EXEMPTION --
IN COCHISE COUNTY, AZ**

**CHEMICAL LIME COMPANY'S
MOTION TO STRIKE
PORTIONS OF REPLY**

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*Attorney for
Chemical Lime Company*

Dated: August 9, 2005

BEFORE THE SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-441 (SUB-NO. 4X)

**SAN PEDRO RAILROAD OPERATING COMPANY, LLC
-- ABANDONMENT EXEMPTION --
IN COCHISE COUNTY, AZ**

**CHEMICAL LIME COMPANY'S
MOTION TO STRIKE
PORTIONS OF REPLY**

Chemical Lime Company ("Chemical Lime") files this Motion to Strike portions of the reply ("Reply") filed by San Pedro Railroad Operating Company, LLC ("SPROC") on August 3, 2005. SPROC filed its Reply in response to Chemical Lime's Statement in Opposition to SPROC's petition for exemption from abandonment proceedings ("Opposition"), filed July 14, 2005. SPROC's petition ("Petition") was filed June 6, 2005.

Ordinarily, the Board does not allow replies to replies. 49 C.F.R. § 1104.13(c). In an order issued July 28, 2005 ("July 28 Order"), the Board authorized SPROC to file a reply, but stated: "SPROC is cautioned that it should respond directly to issues raised and evidence presented in the reply statements, and not submit evidence and argument that could have been submitted with SPROC's petition." July 28 Order at 2.

SPROC has violated the Board's order. The Reply consists of a total of 61 pages of argument and documents that, if relevant at all, constitute evidence that should have been presented with the Petition. A motion to strike portions of a reply is appropriate where, as here, those portions do not truly "reply" to matters raised in the original

pleading. 49 C.F.R. § 1104.8 (Board may strike “impertinent” material). Most of SPROC’s Reply consists of evidence that could have been filed as part of its original pleading. Chemical Lime is prejudiced by the filing of that new evidence because it does not have a full opportunity to respond in the context of this exemption proceeding. Accordingly, Chemical Lime files this Motion to Strike.

I. THE REPLY DOES NOT RESPOND DIRECTLY TO CHEMICAL LIME’S POINT

Chemical Lime’s Opposition focused on one simple point: SPROC’s Petition failed to provide sufficient evidence to justify an exemption from the normal abandonment procedures. SPROC’s Reply does not respond directly to that argument, and instead alleges additional facts that should have been presented as part of its Petition.

The only proper subject for a Reply should have been to point out evidence that SPROC has already submitted that, without more, justified an exemption from the regular abandonment procedures. Instead, SPROC’s Reply attempts to rebut Chemical Lime’s argument that SPROC failed to submit sufficient evidence by submitting new evidence. Attached to its Reply, SPROC includes a new 18-page statement from SPROC Chairman David L. Parkinson (“New Parkinson Statement”), with 26 pages of attachments.

II. REQUEST TO STRIKE

In its July 28 Order, the Board allowed SPROC to file a reply, but cautioned SPROC not to submit evidence and argument that could have been submitted with SPROC’s Petition. In its Reply, SPROC has done exactly what the Board explicitly told it not to do. Chemical Lime is prejudiced by SPROC’s disregard of the Board’s order because it does not have a full opportunity to respond in the limited context of this exemption proceeding. Because SPROC has violated the Board’s express order,

Chemical Lime requests that the Board strike the following matters from SPROC's Reply:

A. Matters To Be Stricken From The Main Argument.

1. Argument #2, paragraph 2: This section relies heavily on the newly filed financial statements in Attachment 3. It also introduces a \$5,000-per-mile computation for track maintenance costs, which could and should have been included in its original Petition. Therefore, it is prohibited by the July 28 Order.
2. Argument #4, paragraph 3: This paragraph is also based on the \$5,000-per-mile maintenance computation from Argument 2, which SPROC could have included in its first Petition, but did not. Therefore, it is prohibited by the July 28 Order.
3. Argument #5, paragraph 3: SPROC cites the ICC's "historic '34 car per mile viability test'" as evidence that SPROC's burden in keeping the rail line operating is too great to bear. Reply at 15-16. This purported "test," along with new calculations of traffic density, could have been included in SPROC's original Petition. Therefore, it is prohibited by the July 28 Order.¹

¹ In addition, SPROC misstates the law. The Board has stated explicitly that it does not use the "cars per mile per year" test in exemption proceedings, especially when they are contested. See Tulare Valley Railroad Company -- Abandonment and Discontinuance Exemption -- In Tulare and Kern Counties, CA, STB Docket No. AB-397 (Sub-No. 5X) (STB served Feb. 21, 1997). In Tulare Valley, the Board could hardly have been more clear:

With regard to the Ultra to Ducor line segment, TVR has failed to present credible evidence that this line segment cannot be operated profitably. It has advanced the novel argument that 4.2 carloads per mile per year show that the line is unprofitable. This is not a standard that we use to determine a line's profitability. TVR has cited four cases that it argues show that lines with less traffic per mile have been approved for abandonment through the exemption procedures. *But, in each of those exemption proceedings, the proposed abandonments were unopposed and the carloads per mile factors were not discussed or given as a reason for approval. Accordingly, we attach no weight to TVR's proposed standard and will not use TVR's carload per mile comparisons as a substitute for legitimate methods of determining profitability.* Tulare Valley (emphasis added).

It should also be noted that the level in Tulare Valley, 4.2 carloads per mile per year, is half of the level projected in SPROC's own Reply. Reply at 15-16.

4. Argument #5, paragraph 3: SPROC calculates its deficit on the rail line to be \$2 million a year. This number appeared nowhere in its original Petition, and along with any supporting evidence in the Reply, it should be stricken.

B. Matters To Be Stricken From The New Parkinson Statement.

1. Section 5: This section is based on Attachment 1, a document created after Chemical Lime filed its Opposition Statement. This is new evidence that does not respond directly to the argument raised by Chemical Lime's Opposition, and thus is prohibited by the July 28 Order.
2. Sections 7 and 10: These sections are based directly on Attachment 3, which could have been included in SPROC's original Petition, and thus is prohibited by the July 28 Order.
3. Section 13: This section is new evidence of SPROC's negotiations with Ferromex and its plans for the rail line in question. This is information that should have been included in the original Petition, and thus is prohibited by the July 28 Order.
4. Section 14: This section is based on Attachment 7, a bridge study commissioned by SPROC, which was complete when SPROC filed its Petition and could have been included. It is therefore prohibited by the July 28 Order.
5. Section 17: This section is an extended chronology of the events which led SPROC to cease service unilaterally on the section of rail line that serves Chemical Lime. This chronology could have been provided in the original Petition, and thus is prohibited by the July 28 Order.

C. Matters To Be Stricken From The Attachments.

1. Letter from John H. Dugan of the Arizona Railroad Group to Thomas Hughes, distribution manager of Chemical Lime, dated July 22, 2005. This letter was sent by SPROC after Chemical Lime filed its July 14, 2005, Opposition Statement, and thus is new evidence prohibited by the July 28 Order.²

² Citing this letter, SPROC argues that Chemical Lime's assertion that "SPROC has never provided Chemical Lime with any proposal to build such a facility" is "[u]ntrue." New Parkinson Statement at 4. The fact that SPROC created this document on July 22, 2005, after Chemical Lime filed its Opposition, demonstrates that Chemical Lime's assertion was correct.

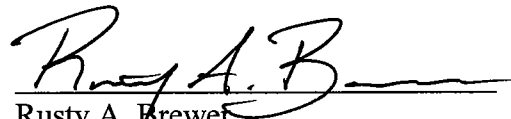
2. Letter from David L. Parkinson to Don Robinson, Vice President, Operations of Chemical Lime, dated June 1, 2004. This letter is evidence of the nature of the agreement between Chemical Lime and SPROC to keep the rail line at issue open until at least December 31, 2004, in exchange for \$2,500 per month. The letter could have been included in the original Petition and is prohibited by the July 28 Order.
3. Cover memorandum from Mr. Parkinson to John Heffner, dated July 29, 2005, and three years of SPROC's financial statements. This evidence could have been included in SPROC's original Petition and is prohibited by the July 28 Order.
4. Series of e-mails between Mr. Parkinson and Rogelio Velez Lopez de la Cerda of Ferromex, the last dated Jan. 25, 2005. This evidence could have been included in SPROC's original Petition, and is prohibited by the July 28 Order.
5. Bridge inspection report from Osmose Railroad Services, Inc., dated June 6, 2005. This Report could have been included in the SPROC's original Petition, and is prohibited by the July 28 Order.³
6. Letter from David L. Parkinson to Mark Juszli, Vice President, Logistics & Business Development of Chemical Lime, dated June 30, 2005. This letter outlines an offer of \$50,000 from SPROC to Chemical Lime in return for Chemical Lime's agreement not to oppose SPROC's abandonment request. The letter is new evidence, created after SPROC filed its original Petition, and is prohibited by the July 28 Order.
7. Letter from Edward W. Pritchard of the Federal Railroad Administration to Mr. Parkinson, dated June 10, 2005. This document was created after SPROC filed its Petition, and is new evidence prohibited by the July 28 Order.

³ If this attachment is not stricken, the Board should note that Osmose found no Category 1 repairs that needed to be completed immediately. All the deficiencies it identified were lumped together as Category 2 or 3 repairs. Category 3 repairs include sections of track that are not unsafe, but should be monitored frequently and should be repaired in the near future. Reply at Attachment 7 at 3, 6-7.

III. CONCLUSION AND REQUESTED RELIEF

SPROC's own Reply demonstrates the existence of numerous material fact issues, which cannot be decided in the context of an exemption proceeding. SPROC will have a full opportunity to present new evidence in the context of full, formal abandonment proceeding under 49 U.S.C. § 10903, pursuant to 49 C.F.R. § 1152. Because SPROC has clearly violated the Board's July 28 Order, Chemical Lime requests that the Board strike the portions of SPROC's Reply described above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rusty A. Brewer", is written over a horizontal line.

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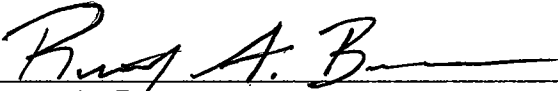
*Attorney for
Chemical Lime Company*

Dated: August 9, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have served all parties of record in this proceeding with this document by United States mail.

August 9, 2005


Rusty A. Brewer